

## TABLE OF CONTENTS

<b>Overview of this submission</b>	<b>2</b>
<b>Introduction</b>	<b>3</b>
Alignment with Australian Law	4
Enhancing Commerce Commission’s enforcement of the FTA	4
<b>Part 1 - Additional Provisions that should be included</b>	<b>5</b>
Compulsory Interview Powers	5
All inclusive pricing	9
Criminal Penalties	11
Civil Penalties	12
Unfair Contract Terms	12
Unconscionable Conduct	13
<b>Part 2 -Submissions on Existing Provisions of the Bill</b>	<b>14</b>
Substantiation	14
The Purpose Statement	16
Court Enforceable Undertakings	17
Infringement Notices	18
Management Banning Orders	19
Uninvited Direct Sales	19
Extended Warranties	22
Layby Sales	23
Additional Product Safety Powers	23
Jurisdiction of Disputes Tribunals	24
Contracting Out	24
Consumer Information Standards	25

## Overview of this submission

1. The Commerce Commission thanks the Commerce Committee for the opportunity to submit on the Consumer Law Reform Bill (the Bill).
2. As the enforcement agency for the Fair Trading Act 1986 (FTA), and other consumer law, the Commission has a unique and important perspective on the changes proposed by the Bill.
3. Our submission focuses on the Bill's impact on the Commerce Commission's ability to effectively and efficiently enforce the FTA.
4. The Commission supports the Bill, as it updates New Zealand's consumer laws and further aligns them with Australia's. However, we also consider that the Bill represents a missed opportunity to thoroughly update and future-proof the FTA, and achieve consistency with the Australian Consumer Law and other similar legislation. The Commerce Commission's submission has been prepared in two distinct sections:
  - 4.1 **Part 1** - Comments on additional provisions that the Commission considers should be included in the Bill:
    - 4.1.1 interview powers
    - 4.1.2 all inclusive pricing
    - 4.1.3 criminal penalties
    - 4.1.4 civil penalties
    - 4.1.5 unfair contract terms
    - 4.1.6 unconscionable conduct.
  - 4.2 **Part 2** - Comments on the existing provisions of the Bill that are relevant to the Commission
    - 4.2.1 substantiation
    - 4.2.2 purpose statement
    - 4.2.3 court enforceable undertakings
    - 4.2.4 infringement notices
    - 4.2.5 management banning orders
    - 4.2.6 uninvited direct sales
    - 4.2.7 extended warranties
    - 4.2.8 layby sales

- 4.2.9 additional product safety powers
- 4.2.10 jurisdiction of Disputes Tribunal
- 4.2.11 contracting out
- 4.2.12 consumer information standards.

## Introduction

5. Considerable change has occurred in New Zealand since the FTA was introduced in 1986. The rise of e-commerce and online trading, globalisation of markets and increasing complexity of products and services have significantly changed the way in which consumers engage with traders and have added to the difficulties faced in accessing and processing accurate information.
6. The Commission considers that modern consumer law must reflect this change, while being flexible enough to adapt to currently unforeseen future developments. From an enforcement perspective, the Bill can achieve these objectives by:
  - 6.1 consolidating and building on existing consumer law
  - 6.2 aligning New Zealand's law as closely as possible with the Australian Consumer Law
  - 6.3 providing the Commission with the tools it needs to enforce the law and meet the expectations placed on it by Parliament and taxpayers
  - 6.4 containing maximum penalties commensurate with the seriousness of the conduct.
7. The Bill goes a long way towards achieving these objectives. The proposed amendments to the FTA will benefit New Zealand's economy, by fostering competition between traders and enabling consumers to enter into transactions with greater confidence.
8. However the reform does not go far enough, and in its current form, the Bill represents a missed opportunity to bring New Zealand's consumer law in line with international best practice and to provide the best protection to consumers and ethical traders. In particular:
  - 8.1 there should be further alignment with Australia's consumer law
  - 8.2 the amendments should align with goals of protecting consumers and ethical traders, promote effective competition in markets, and enable effective enforcement.

### **Alignment with Australian Law**

9. The Commission sees a number of benefits in further aligning New Zealand's consumer law with Australia:
  - 9.1 In general, we think the Australian Consumer Law is effective law.
  - 9.2 Consistency between New Zealand and Australian law will:
    - 9.2.1 assist in achieving the objective of a single trans-Tasman economic market
    - 9.2.2 assist in ensuring consistency in enforcement approach between New Zealand and Australian regulators
    - 9.2.3 increase opportunities for collaboration and sharing of resources between the Commission and much larger Australian regulators
    - 9.2.4 provide certainty for those businesses who trade in New Zealand and Australia
    - 9.2.5 further protect New Zealand consumers and businesses from unscrupulous traders who may be more willing to offend in New Zealand due to the differences in trans-Tasman consumer law
    - 9.2.6 allow the Commission, and the Courts to rely on decisions from Australia when determining whether conduct contravenes the FTA.
10. Already there is evidence that the new Australian law enables Australian regulators to act more quickly than the Commission can, primarily because of provisions such as those discussed in this submission, particularly the interview powers and substantiation provisions.
11. Consequently a major theme of our submission is the need to go further in aligning our law with Australia's.

### **Enhancing Commerce Commission's enforcement of the FTA**

12. While we put considerable resource into educating traders about their obligations, there will always be businesses that operate outside the law. Our focus is to detect those breaches and to deal appropriately with the businesses involved. We decide how to enforce the law by seeking to limit the harm to other businesses and consumers, and to deter reoffending.
13. The existing provisions of the Bill will provide some important legislative support to the Commerce Commission's enforcement approach (for example, Substantiation, Court Enforceable Undertakings and Infringement Notices). However, the effect of those provisions and the consumer law generally will be further enhanced by including provisions such as Interview Powers, All Inclusive Powers and the other provisions highlighted in Part 1 of this submission.

14. Timeliness of resolution is important in our investigations. Any delay in resolving breaches of consumer law can cause significant detriment to consumers, honest traders and markets. Continuing breaches not only cause on-going harm, but also a loss of confidence in the law. Also, in today's environment, traders can appear and disappear quickly, for example, pop up shops and online trading. Any delay in taking action may allow those traders to avoid responsibility altogether.
15. A formal interview power will increase the timeliness of our FTA investigations and is particularly important given the additional responsibilities for the Commission created by this Bill.

### **Part 1 - Additional Provisions that should be included**

16. In this part of the submission, the Commission would like to highlight a number of provisions that it considers should be included in the Bill to:
  - 16.1 further align the Bill with Australian consumer law
  - 16.2 enhance the Commission's enforcement of the FTA.

### **Compulsory Interview Powers**

#### *Submission*

17. The Commission considers that a formal interview power, under which an individual is required to attend an interview with the Commission and answer all questions put to him or her, is a necessary addition to the Commission's enforcement powers. The Commission already has this power in relation to its Commerce Act and Credit Contracts and Consumer Finance Act (CCCFA) investigations. Interview powers are an effective tool for investigating conduct that contravenes those Acts. The FTA currently provides no such interview power to the Commission.
18. We submit that an interview power, similar to that contained in s98(c) of the Commerce Act be included in the FTA.

#### *Use of Powers elsewhere*

19. Compulsory interview powers are not rare. There are numerous examples of government agencies that have interview powers, including:
  - 19.1 Financial Markets Authority;
  - 19.2 Inland Revenue Department;
  - 19.3 Serious Fraud Office; and
  - 19.4 The Commerce Commission (under the Commerce Act and CCCFA).
20. Australian regulators have similar powers for investigations under the Australian Consumer Law. We consider that similar powers in other New Zealand enactments provide a template for the FTA. They contain built-in protections for the interviewee,

including protections against information being used as evidence against them in any proceedings.

### *Other Reasons*

21. In our experience under the Commerce Act and CCCFA, there are a number of operational reasons for interview powers.
  - 21.1 *Better results*: we have found that we get the best evidence by talking to the individuals involved in the conduct. This allows us to make better decisions as to which matters we continue to investigate and which we take no further.
  - 21.2 *Faster investigations*: being able to talk with the individuals involved expedites investigations significantly. In complicated cases, particularly those of a commercial nature involving complex financial or technical information, the Commission has found that it is essential to speak directly with those individuals who have personal knowledge of the relevant material. Where interviews are refused in such cases, it can be very difficult for the Commission to obtain and assess all the relevant factual information. Often only the trader or traders being investigated hold important factual information that is critical to the investigation. While it is common for the Commission to use its written notice powers where interview requests are refused, in practice these can be unsatisfactory and very time consuming. For example, an unexpected or limited answer may give rise to the need for further written questions. Such enquiry increases the cost of our investigations.
  - 21.3 *Better achieve the purposes of the Act*: consumers and compliant traders are better protected if the Commission has the right tools to investigate and stop non-compliant behaviour. Sometimes detailed factual information is necessary to determine the appropriate levels of consumer compensation that should be paid and by which parties.
  - 21.4 *Consistency with other regulators and investigative agencies*: as noted earlier, many other regulators (including the Commission in the Commerce Act and CCCFA context) have these powers. In our view, consistency between regulators is desirable. The current absence of such a power has sometimes meant that the Commission cannot resolve larger investigations as quickly as overseas regulators.
22. Under the Commerce Act, the Commission uses its powers in approximately 20 % of all interviews with individuals. The remainder are voluntary interviews, where the interviewee has agreed to be interviewed by the Commission. However, we have found the compulsory powers to be a useful tool when potential interviewees are reluctant to volunteer information to the Commission. In some Commerce Act investigations we have found that individuals have preferred a compulsory interview situation, because it gives them certain legal protections.

23. In the FTA context, we currently attempt to interview traders and individuals involved. In many cases the request for an interview is simply refused. However, in some cases, the traders and individuals do agree to these interviews without conditions. Increasingly though, it is common for the consenting trader or individual to impose conditions on these interviews; for example they will agree to an interview, but only on the basis that a list of all questions is provided in advance or that the trader/individual will only answer selected questions. From an investigative perspective, these interviews can be of little value, but they are the best we can do with our current powers. Also, such interviews can substantially delay an investigation. It is common for a trader, individual or their legal advisors to insist on significant delays to interviews – sometimes for months. This is increasingly impeding the Commission’s ability to investigate in a timely fashion, to the detriment of consumers and compliant traders.

*Examples of Commission investigations where interview powers would have been useful*

24. In one case involving high pressure door to door sales techniques targeted at lower income areas, the trader had on several occasions promised interviews only to later defer and then cancel them. That appeared to be a tactic to delay the investigation while further breaches were being committed. As a result the Commission’s investigation was slowed with the result that the Commission’s injunction to stop the conduct was delayed.
25. In another case, properties were marketed as being an “ownership,” opportunity. In reality, the properties were in fact being offered on a “rent to own” basis and the occupiers did not get title to the properties for 30 years. One marketer agreed to an initial interview but none of the other marketers or many investor companies agreed to be interviewed. Although s47G notices were used, these did not provide sufficient information to enable the Commission to identify the key facts and to distinguish liability between the various parties. Consequently, the Commission proceeded with criminal and/or civil action against all marketers and investor companies. A very cumbersome and protracted court case resulted. Although the Commission’s court case was successful, the protracted nature of the investigation and litigation meant that the payment of appropriate compensation to occupiers was significantly delayed. A compulsory interview power in this case would have enabled a much quicker investigation and more appropriate resolution. It is much less likely that the Commission would have needed to have involved the many investor companies in the court proceedings.
26. Many other examples can be provided if required.

*Possible reasons against*

27. We have been advised that there is a reluctance to include an interview power in the FTA because:
- 27.1 it infringes on the rights of the person being interviewed

- 27.2 it contravenes the common law rule against self-incrimination in criminal proceedings
  - 27.3 it increases the coercive power of the State without reasonable justification
  - 27.4 the offences in the FTA are not serious enough to warrant such a power
  - 27.5 the power could be used for the purposes of intimidation
  - 27.6 it may affect the employment relationship between the interviewee and his or her employers.
28. Most of these concerns are set out in more detail in the Ministry of Consumer Affairs' Consumer Law Reform Additional Paper – February 2011.
29. The Commission understands some of these concerns, but considers that they are overstated and that there are sufficient safeguards to address them.
30. First, in the Commission's view, an interview power does not unreasonably infringe on the rights of the person being interviewed. In our opinion, an interview power does not contravene sections 22, 23 and 25 of the New Zealand Bill of Rights. Sections 22 and 23 relate to the rights of a person arrested or detained. Although the person is compelled to attend an interview and answer questions, there is no arrest or detention as is anticipated by the Bill of Rights. Section 25 protects the rights of persons charged with criminal offences. Those concerns do not arise here, as no charges will have been laid against the person at the time of the interview. Also, there are a number of safeguards that can be implemented to ensure that interviewee rights are protected. For example:
- 30.1 There should be appropriate protections against self-incrimination for the interviewee. For example, the Commerce Act provides that although a person must answer the questions put to him or her, any response cannot be used as evidence against that person in criminal proceedings under the Act. We would envisage that any power under the FTA would have a similar protection.
  - 30.2 In compulsory interviews carried out under the Commerce and CCCF Acts, the Commission permits interviewees to have legal representation at any interview and be able to consult, in private, with that representative at any time during the interview.
31. These protections against self-incrimination also address the concern that the power may contravene any common law rules against self-incrimination (if such rules exist in these circumstances).
32. Further, we believe there is reasonable justification for increasing the powers of the Commission to include an interview power. In enacting the FTA, and in conducting this review, Parliament has recognised that conduct in our markets requires intervention. Parliament has decided to enact the FTA and to provide the Commission with powers



in an attempt to correct the problems that exist in our markets. Interview powers will greatly enhance the Commission's ability to achieve Parliament's intention, to enforce the FTA and increase its ability to investigate offending behaviour. There will be less harm to markets and consumers, and ethical traders will therefore be better protected. Also, the Commission's investigations will be faster, more efficient and cost effective, particularly when trying to unravel complex commercial conduct.

33. FTA offences are sufficiently serious to justify an interview power. FTA investigations can involve serious offending, sometimes with potential harm running into the many millions of dollars. Likewise, the suggestion that the Commission would use this power for the purposes of intimidation is not supported by any evidence to suggest this might occur and is contrary to the Commission's use of the powers under other legislation it enforces.
34. Last, any employment law concerns that may arise are, in our opinion, overstated. The fact that the employee has been compelled to provide information to the Commission will provide that employee with protection from any action taken by his or her employer. It is difficult to see how an employer could justifiably take disciplinary action against an employee in these circumstances. Indeed, in the past, the absence of the ability to compel information from employees has given rise to employment law concerns. For example, the Commission has encountered instances where senior company employees have intimated to Commission investigators that they would have liked to have been more open in their voluntary responses, but were concerned about subsequent action against them by their employer.

### **All inclusive pricing**

#### *Submission*

35. The Bill does not currently include provisions relating to all inclusive pricing. The Commission submits that all inclusive pricing provisions, similar to those that apply in Australia, should be included in the Bill.

#### *Proposed Amendments and Reasons*

36. The Commission supports the inclusion of all inclusive pricing provisions in the FTA for the following reasons.
  - 36.1 The practice of breaking the price of a good or service into component parts (component pricing) can have an adverse effect on competition by making it difficult for consumers to determine the actual price of a good or service. All inclusive pricing provisions have the potential to prevent a business gaining an unfair competitive advantage.
  - 36.2 An all inclusive pricing provision would ensure that consumers are better informed by enabling them to readily identify the price of a good or service, and to make reliable comparisons between like goods and services.
  - 36.3 It would further align New Zealand law with consumer law in Australia. It is especially important that there is consistency in the area of airline pricing and

in relation to other travel related purchases, such as rental cars. A similar provision to that in Australia would also enable the Commission to use relevant Australian legal precedent as well as relevant Australian Competition and Consumer Commission (the ACCC) educational material.

#### *Current Situation*

37. Pricing issues remain the most common source of Fair Trading complaints to the Commission. The addition of all inclusive pricing provisions would substantially assist the Commission's Fair Trading enforcement activities relating to pricing complaints.
38. There has been a growing trend by traders to separate out additional costs and charges from a stated headline price. In many cases, the existence of these additional costs are buried in fine print or otherwise inadequately disclosed. Advertising prices in this way creates an impression that the good or service is for sale at a lower price than the consumer will actually have to pay.
39. Issues identified by the Commission that would have been more effectively dealt with by an all inclusive pricing provision include the separation of on-road costs from motor vehicle prices, disclosure of airfares and rental car hire prices and GST. In some of these areas significant costs continue to be separated off from the headline prices, complicating consumer purchasing decisions.
40. Another example of the issues associated with component pricing is the bundling of telecommunications products. The bundling of a number of products or services in a single purchase package is a developing trend in the telecommunications market. While product bundling can lead to cheaper prices for consumers and increased competition, component pricing practices have given rise to complaints from both consumers and competitors because the true price may not be clear.
41. To date, the Commission has dealt with the bundling issue in telecommunications by issuing a guideline setting out in detail the need for the companies to clearly disclose the condition that customers need to purchase other services to be eligible for the advertised price of, say, broadband services. While this approach has eventually had some success, the Australian law provides a solution which is much clearer and helpful to consumers seeking to compare prices. The Australian law simply requires the total cost of the plan to be clearly disclosed.

#### *Alignment with Australian Law*

42. Australian law contains all inclusive pricing provisions. These provisions require that price representations for goods and services that are broken down into component parts must also prominently display the total price to be paid. The total price must be specified at least as prominently as the other components of the price.
43. The ACCC has reported that the all inclusive pricing provisions have been useful in dealing with pricing issues relating to air fares, rental car rates and motor vehicles. As noted above, they have also had an impact on telecommunications advertising.

## **Criminal Penalties**

### *Submission*

44. In our experience the maximum penalties available under the FTA (\$200,000 for a company, \$60,000 for an individual) are inadequate to act as a deterrent and suitable punishment for serious offending, particularly by large companies. At present, the Bill does not include a change to the maximum penalty.
45. We think this review presents a timely opportunity to reconsider the penalties available under the FTA, particularly as there has been a recent shift, locally and internationally, towards an increase in penalties for misleading and deceptive conduct. For example:
- 45.1 The Australian Consumer Law has maximum penalties of \$1.1 million for a company and \$220,000 for an individual for misleading and deceptive conduct.
  - 45.2 The Securities Act contains criminal penalties of \$300,000 and \$10,000 for every day that the offence is continued. The civil pecuniary penalties are a maximum of \$5 million for a company and \$500,000 for an individual.
  - 45.3 The Financial Markets Conduct Bill proposes penalties for misleading and deceptive conduct of the greater of:
    - 45.3.1 the consideration for the transaction that constituted the contravention (if any)
    - 45.3.2 3 times the amount of the gain made, or the loss avoided, by the person who contravened the civil remedy provision
    - 45.3.3 \$1 million in the case of a contravention by an individual or \$5 million in any other case.
46. In addition to the greater deterrent effect of higher maximum penalties, the Commission considers that there are good enforcement reasons for reconsidering the criminal penalties under the FTA. Currently in serious cases the Commission has attempted to address the issue of the low maximum penalty by laying multiple charges to ensure that the available maximum penalty adequately reflects the seriousness of the conduct. This is not always possible though and, even where it is, the maximum available penalty is sometimes insufficient to take account of the seriousness of the conduct and the potential harm.

### *Proposed amendment*

47. Having penalties equivalent to the Australian Consumer Law would provide further harmonisation of the law between New Zealand and Australia. More importantly, the current difference between penalties means New Zealand is vulnerable to unscrupulous traders who may be more willing to offend in New Zealand where the penalties for a body corporate are less than one-fifth of the Australian maximum.

There has recently been an increasing trend for Australian-based companies to direct misleading conduct at New Zealand.

## **Civil Penalties**

### *Submission*

48. The Law Commission is currently reviewing the use of civil pecuniary penalties in New Zealand. We understand the Law Commission may report back in July 2012. The Law Commission's view is likely to hold some weight in any decision about the ongoing use of civil penalty provision in legislation. We submit that consideration be given to including civil penalties in the FTA, with a final decision to be made upon completion of the Law Commission review.

### *Reasons*

49. Unlike the Australian Consumer Law, the Commerce Act, CCCFA, Securities Act or the proposed Financial Markets Conduct Act, the FTA has no civil penalty, pecuniary penalty or statutory damages provisions. In the Commission's opinion there could be merit in the strict liability offences under the FTA being subject to civil rather than criminal sanction.
50. There are a number of potential benefits to a civil penalties regime:
- 50.1 Consistency with Australian Consumer Law, Commerce Act, CCCFA and securities legislation;
  - 50.2 Removal of criminal sanction for strict liability conduct.

## **Unfair Contract Terms**

### *Submission*

51. The Commission supports the inclusion of a prohibition against Unfair Contract Terms in the Bill. We submit that these provisions should be based on those contained in the Australian Consumer Law.

### *Reasons*

52. The Australian Competition and Consumer Commission's submission to the Australian Productivity Commission identified two interlinked policy rationale for an unfair contract terms provision. First, that consumers tended to enter into contracts containing unfair terms because of transactional costs involved in reading the fine print, understanding it and assessing the resulting risk. Second, that such terms were not therefore subject to the competitive processes, unlike the core contractual terms of product and price. In our view this policy rationale applies equally to New Zealand.
53. The Commission supports the inclusion of a prohibition against Unfair Contract Terms in the FTA, identical to those contained in the Australian Consumer Law.

### *Current Situation*

54. In the Commission's Fair Trading enforcement work, we have identified some issues which may have been more effectively dealt with if there had been an Unfair Contracts Terms provision. Examples include:
- 54.1 A telecommunications company increased a customer's monthly plan price for their broadband service from \$35 to \$40 six months into a two year contract. In doing so the company relied on a term permitting unilateral price increases in their standard form contract of service. The company told the customer that the price increase was due to an increase in the wholesale price that they were paying to a third party for the service. The company insisted that a significant termination fee would be charged if the customer cancelled their contract due to the increased price of the plan.
  - 54.2 A "Rent to own" scheme (referred to previously in paragraph 25) included terms and conditions in their contracts to the effect that the consumer did not purchase the property but was granted a right to occupy the property under a 30 year instalment agreement. There were a number of contractual terms that would have been likely to have been regarded as unfair. For example, the occupiers had to pay for any repairs that the investor companies said needed doing. Also if the occupiers failed to meet a payment at any time in the 30 year period, the agreement could be terminated.
  - 54.3 A company leased water filters to the lessee for a period of two years for a minimum price of \$15 per week. The contract included a clause requiring the lessee to exercise a right of purchase or to cancel within seven days of the end of the lease. If the lessee failed to purchase or cancel, the contract automatically rolled over for a further period of two years on the same terms. These requirements were not clearly disclosed to the lessee when the contract was entered into.

### **Unconscionable Conduct**

#### *Submission*

55. The Bill does not currently include provisions relating to unconscionable conduct. The Commission supports the inclusion of unconscionable conduct provisions in the Bill. We submit that the provisions should be based on those contained in the Australian Consumer Law.

#### *Current situation*

56. The legal protections provided for consumers and small businesses from unconscionable conduct differ markedly between New Zealand and Australia.
57. In New Zealand, the Commission cannot take action where it detects unconscionable conduct unless that conduct also contravenes the existing provisions of the FTA.
58. The Australian Competition and Consumer Commission advises that, even where the conduct is misleading and/or an unfair contract term, it is most appropriate to use the

unconscionable conduct provisions, because the real harm caused by the conduct is that it is unconscionable.

59. The case involving 'rent to own' property schemes referred to previously (paragraphs 25 and 54.2) is an example of a New Zealand case on point. The schemes granted a right to occupy the property under a 30 year instalment agreement. These did not give the occupier legal ownership of the property until the end of the 30 year period. The Judge dealing with one of the resulting cases commented that 'folk were lured into commitments which were a recipe for disasters in which they lost everything they had put into the property they were seeking to acquire.' It is likely that a court would have considered the marketing of these agreements to vulnerable consumers as being unconscionable conduct. In that instanc, the Commission was able to act only because there was also misleading conduct, but it was not able to address the issue of possible unconscionable conduct.

## **Part 2 -Submissions on Existing Provisions of the Bill**

### **Substantiation**

#### *Submission*

60. The Commission supports the proposed prohibition on unsubstantiated claims. The provision has the potential to materially assist the Commerce Commission's work in many areas and provide additional protections for consumers and ethical traders. The Commission considers the substantiation provisions to be the most important provision of the Bill.
61. In our view consumers are likely to believe that advertisers have a reasonable basis for the claims they make. Many advertisements also contain implied claims. It seems appropriate to require that traders making such claims should have a reasonable basis for them.
62. Also, a substantiation requirement does not place an onerous obligation on businesses. There is no requirement that businesses must hold information substantiating claims made about the goods or services they sell. Instead, businesses must simply have a reasonable basis for making those claims. That reasonable basis can come from:
- 62.1 claims made by reputable suppliers or manufacturers
  - 62.2 information in the businesses' possession
  - 62.3 any other reasonable source (ie scientific/medical journals).

#### *Proposed Amendment and Reason*

63. The Commission has been consulted on the wording of this provision and believes that, with one relatively minor alteration, it will achieve its purpose while providing traders with appropriate safeguards.

64. The one amendment that the Commission wishes to propose is in relation to the wording of the following definition of Unsubstantiated Representation in clause 12A:

“Unsubstantiated representation means a representation made by a person who does not, at the time of making the representation, have reasonable grounds for the representation, irrespective of whether or not the representation is in fact false or misleading.”

65. Our understanding is that this provision is intended to require those in trade to have reasonable grounds for making a representation, regardless of whether the representation is in fact a breach of the Act. We consider that the last sentence fails to recognise that conduct that is simply “liable to mislead” also contravenes the Act. The Commission considers that the proposed provision should be amended to read “irrespective of whether or not the representation is in fact false, misleading or liable to mislead”. This amendment will make it clear that the substantiation provisions apply to all representations that currently fall under the FTA.

#### *Current Situation*

66. The Commission frequently receives complaints regarding claims that are not substantiated and are, on their face, questionable. These types of claims occur in many industries.
67. Currently there is no onus on a trader to substantiate the claims they make. As a result, the Commission is required to effectively disprove the claim – the Commission must prove beyond a reasonable doubt that the claim is false, misleading or liable to mislead. Even where the basis for the claims can be tested, such investigations tend to be expensive and resource intensive.
68. The Commission can, using powers under section 47G of the Act, require traders to provide the information or documents that a trader may rely upon when making a representation. However, if the trader does not have any such information or the information does not, on an objective assessment, provide any reasonable basis for the claims being made, the Commission must still investigate to determine whether the representation contravenes the FTA.
69. The proposed provision will be helpful in dealing with a wide variety of claims, for example, organic claims, broadband speed, origin claims, product and comparative pricing claims. In one comparative pricing case undertaken a few years ago, around 80 covert store visits by Commission investigators were required in order to prove that the traders claims of 50 – 60% off clothing items were misleading as compared to the normal shelf prices. In another case taken the Commission incurred costs of \$177,000 for external scientific and legal experts in addition to significant internal investigative and legal expenses in proving that patently questionable claims were misleading.

#### *Alignment with the Australian Consumer Law*

70. The requirement that traders have reasonable grounds for the claims they make will go some way to further aligning New Zealand law with the Australian Consumer Law. Although the Australian substantiation provision works in a different way to that

proposed in the New Zealand Bill, Australian regulators have nonetheless found their provision to be very helpful in enabling them to more readily assess whether a questionable claim has any reasonable basis. For uniformity reasons it is important that New Zealand also has a substantiation provision.

#### *Educative Benefit*

71. The Commission believes that the clear wording of the proposed provision will materially assist its educative work with traders. The requirement not to make claims without having reasonable grounds for them is a simple and clear requirement that the Commission believes will be easily understood and implemented by businesses.

#### *Only the Commission permitted to require substantiation*

72. The Commission does not see any difficulty with this part of the proposed section. It may well be regarded as offering traders a reasonable safeguard against the provisions being used by competitors in an inappropriate way. The Commission would not investigate a questionable claim unless it was in the public interest to do so. If, in fact, traders do have a reasonable basis for the claim, then a requirement to provide that to the Commission should not be onerous.

### **The Purpose Statement**

#### *Submission*

73. The Commission supports the inclusion of a modern purpose statement in the FTA as it reflects modern legislative drafting practices and presents an opportunity to make Parliament's intention explicit. However, we think the new purpose statement should explicitly reflect, and build on, the existing consumer protection purpose of the FTA. It does not do this.

#### *Proposed Amendments and Reasons*

74. The Commission submits that the proposed purpose statement should explicitly refer to consumer protection. We think that the proposed statement could lead to a recalibration of the purpose of the FTA by the Courts.
- 74.1 It introduces the principle of "fairness" into the FTA, a principle that the Courts have specifically said is not relevant to considerations of whether conduct is misleading or deceptive. In our view there is a real chance that the Courts will now feel compelled to interpret the FTA in a way that achieves the "fairest" outcome as between the consumer and trader, rather than in the way that best protects the average consumer.
- 74.2 The absence of any explicit consumer protection reference might lead the Courts to conclude that Parliament is deliberately excluding such a purpose.
- 74.3 All FTA jurisprudence to date has proceeded on the basis that the Act's principal purpose is consumer protection. Currently the Courts interpret the FTA from the perspective of the average New Zealand shopper. The Courts have recognised that such a group includes those who are gullible, naïve or



uneducated and a person whose “mind is likely to work more by impression than analysis and to be prone to some looseness of thought.”

75. In our view the consequence of any reassessment of the purpose of the Act by the Courts would be to:
- 75.1 Create uncertainty for consumers, ethical traders and the Commission in enforcing the Act. If the purpose of the Act changes, there must be a query as to whether the existing legal precedents will continue to apply. This will create real uncertainty for any person (including the Commission and the Courts) who deals with the FTA.
  - 75.2 Reduce the protections previously afforded to consumers and ethical traders.

### **Court Enforceable Undertakings**

#### *Submission*

76. The Commission supports the inclusion of provisions in the FTA allowing the Commission to negotiate undertakings with traders that are enforceable by the courts. No amendments are proposed to the current wording.

#### *Reasons*

77. A formal undertaking power will provide certainty for traders and consumers that the Commission is able to negotiate binding agreements. While it is possible that the Commission could enforce some settlements by way of contract law, a formal power removes any doubt about this.
78. Because negotiated settlements are a quicker and cheaper alternative to Court actions, this tool will improve the effectiveness and efficiency of Commission interventions.

#### *Current situation*

79. The Commission has often negotiated settlements with traders as a quicker and cheaper alternative to court actions. Sometimes the settlements have involved the traders concerned agreeing to very significant remedies including compensation, in one case of more than \$40 million.
80. Where an undertaking is breached, it may not be possible to take court action for the original offences since they may be time barred.
81. A formal undertaking power would provide certainty for traders and consumers that the Commission was able to negotiate binding agreements. This would improve the Commission’s ability to resolve Fair Trading matters in a timely manner.
82. Court enforceable undertakings are used by the Australian Competition and Consumer Commission on a regular basis.

## **Infringement Notices**

### *Submission*

83. The Commission supports the provision in the Bill to allow it to issue infringement notices for contraventions of consumer information standards, disclosure requirements for layby, uninvited direct sales and extended warranties, and failure to comply with a product safety suspension of supply notice. At present it is not cost effective to take court action against these types of offences, since the costs of doing so outweigh the benefits.

### *Proposed Amendments and Reasons*

84. The Commission submits that the offences for which infringement notices may be issued should be extended to cover breaches of product safety standards and the obstruction of a person carrying out the search warrant powers provided by the FTA. Although some product safety breaches are serious and would warrant stronger action, other breaches such as some of the labelling requirements are not and, in many cases, would also be suitable for infringement notices. Where the offending was sufficiently serious, the Commission would still have the option of prosecuting.
85. Obstruction during a search warrant may also be insufficiently serious to merit a significant fine. Two prosecutions by the Commission for such offences resulted in no fines being imposed by the courts. A provision to deal with obstruction by way of infringement notices may also in some cases be sufficient to deter it.

### *Reasons*

86. Currently the consumer information standard requirements of the FTA are not cost effective to enforce, given that only the Courts can impose a penalty following a criminal prosecution by the Commission. In recent years the average cost of enforcing a Consumer Information Standard through the Courts has been approximately \$15,000 and the average fine imposed for minor offending around \$3,500. Examples of breaches of Consumer Information Standards include motor vehicle dealers who do not display Consumer Information Notices, and retailers who do not comply with Care Fibre Content or Place of Origin labeling requirements for clothing.
87. Because the offending is usually minor, the Commission has generally used compliance letters or warnings to encourage compliance with consumer information standards. This is usually effective but repeated offending can occur where this is not an effective deterrent. Breaches of consumer information standards or disclosure provisions are usually clear cut and easy to establish. The ability to issue an infringement notice would provide an additional remedy for the Commission to use in appropriate circumstances.
88. The Australian Competition and Consumer Commission has advised that infringement notices have assisted them to respond more quickly and efficiently to more minor breaches of their law. Many traders have also appreciated the opportunity provided by the notice to resolve a breach without having to go to court.

## Management Banning Orders

### *Submission*

89. The Commission supports the provision of management banning orders for breaches of the FTA. The proposed orders will be an effective tool for dealing with a small number of repeat offenders who are not deterred by the available penalties.
90. The Commission submits that the proposed banning provisions should be amended to remove the need for two earlier offences, the need for the application to be an originating one, and to provide for indefinite bans from specified industries.

### *Proposed amendments and reasons*

91. *The need for two previous offences.* This requirement is inconsistent with the Australian Consumer Law and with other pieces of legislation that require a single offence. One offence may be sufficiently serious to warrant the public being protected from harm by the individual's likely re-offending. The courts are able to exercise discretion and can only make an order when they are satisfied it is justified. In the Commission's view, that should be a sufficient safeguard.
92. *The ten year limitation on the term of the ban.* The Commission sees value in providing the court with some more, but qualified, discretion. While the Australian Consumer Law provides the courts with a very wide discretion in this regard, we submit that it would be appropriate to include a power for the court to prohibit or restrict a person from involvement in a particular industry for any specified or unlimited period. This would be consistent with other industry specific legislation that has banning orders, such as the Credit Contracts and Consumer Finance Act.
93. *The need for the application to be an originating application.* It is inefficient for the Commission to apply for an order in a civil jurisdiction independently of any criminal proceedings brought by the Commission. The logical time for such an application to be considered is at the sentencing hearing, given that the judge would be aware of all relevant facts and best placed to make a decision as to whether a ban was justified.

## Uninvited Direct Sales

### *Submission*

94. The Commission supports the inclusion of provisions in the FTA that deal specifically with uninvited direct sales. In our view, the proposed provisions are an improvement on the current situation under the Door to Door Sales Act and would be a useful addition to the Commission's Fair Trading work, particularly in relation to telemarketing activities.
95. The Commission proposes the amendments set out below in relation to the \$100 minimum value threshold, the five day "cooling off" period, the supply of goods and services during the cooling off period and an extension of the requirement for written acceptance to be communicated by the purchaser.

*Proposed amendments and reasons*

*\$100 minimum payment threshold*

96. The Bill covers only agreements where the price “paid or payable” is more than \$100. The Commission submits that the \$100 minimum value limit be removed or that the provision be amended in accordance with the Australian Consumer Law provisions. Those provisions apply a \$100 minimum value limit but only where the price paid or payable by the consumer is ascertainable at the time the agreement is made.
97. The Commission proposes these amendments for the following reasons.
- 97.1 From an enforcement perspective the Commission does not consider it necessary to provide for a value limit. In practice there could be a large volume of relatively low value transactions that generate complaints. The standard Commission enforcement criteria (published on the Commission’s website [www.comcom.govt.nz](http://www.comcom.govt.nz)) can be applied to screen complaints received. That mechanism should be sufficient to adequately address any one off low value issues that arise as a result of the lack of a monetary limit.
- 97.2 The application of the \$100 minimum value limit as drafted in the Bill risks excluding ongoing service contracts such as telecommunications contracts from the uninvited direct sales provisions.

*Five day cooling off period*

98. The current provisions have a five day “cooling off” period within which a consumer can cancel an uninvited direct sale agreement. The Commission submits that the cancellation period should be extended to ten days. The most common type of direct selling encountered by the Commission is telemarketing. For a cooling off period to be effective, it needs to be of sufficient length to enable consumers during that period to consider material which may have been sent to them following a telemarketing approach. In the Commission’s view a ten day cooling off period (the same as that contained in the Australian Consumer Law) would be more appropriate.

*Obligations of the buyer and seller in the event of cancellation during the cooling off period*

99. The Commission submits that there should be a general prohibition on supply and accepting payment during the cooling off period. This is particularly relevant in the telecommunications context. Consumers who change their mind about switching telecommunications service providers during a cooling off period may, in the meantime, incur a termination fee as a result of the transfer of service to the new provider. The Australian Consumer Law prohibits the supply or acceptance of payment for goods or services during the cooling off period. In the Commission's view a prohibition on supply and accepting payment is necessary to give full effect to the purpose of the cooling off period and to ensure that consumers who exercise their right of cancellation during the cooling off period are not liable for any associated costs.

### Acceptance by the purchaser

100. The provisions proposed in the Bill do not require the uninvited direct sale agreement to be signed by the purchaser. The Commission submits that the provisions be amended to include a requirement that the agreement be signed by the purchaser or, in the alternative, that written acceptance of the terms and conditions be communicated by the purchaser to the seller.
101. The Commission proposes these amendments for the following reasons:
- 101.1 Under the proposed provisions, the written agreement becomes binding and enforceable automatically after the expiry of the 5 working day cancellation period. In some telemarketing approaches, the only evidence available in relation to the terms or existence of an agreement will be an individual's recollection of a telephone conversation that took place with a telemarketer many months before the dispute is subject to investigation. Requiring the written agreement to be signed by the purchaser provides reliable evidence of the consumer's intention to contract with the supplier on the terms contained in the agreement.
  - 101.2 In relation to telemarketing approaches, it is unclear from the provisions whether or not an agreement is made in the course of the telemarketing call. A requirement for the consumer to communicate written acceptance to the supplier ensures that there is reliable evidence of the consumer's intention to contract with the seller / supplier on the terms contained in the agreement.
  - 101.3 Provision could be made for acceptance of the terms of the written agreement to be communicated by the consumer to the seller electronically to expedite the sale process.

### *Current situation*

102. The Commission receives a disproportionate number of Fair Trading complaints regarding door to door selling and telemarketing when compared with complaints regarding sales made at retail stores or online. In recent years, telemarketing calls by or on behalf of telecommunications or electricity companies have resulted in a significant number of complaints to the Commission, including:
- 102.1 Misrepresentations as to the nature of the services to be provided.
  - 102.2 Misrepresentations as to the price of the services.
  - 102.3 Unauthorised switching from one supplier to another.
103. The investigation of such complaints can be difficult as the relevant representations are often verbal with no accompanying documentation. Furthermore, consumers may not recall the relevant discussions clearly as they did not initiate contact with the seller.

104. Complaints made to the Commission about uninvited direct sales often raise both the hard sell technique used and representations which are misleading or deceptive. It is sometimes difficult to obtain clear evidence of alleged misrepresentations as they will usually be verbal in nature and complainants may be elderly.
105. The current legislation was enacted before some modern sales methods were envisaged. Consequently the coverage of existing legislation is uncertain. From an enforcement perspective, the Bill's clarification of the forms of uninvited direct sale marketing covered by the legislation is useful and necessary.

### **Extended Warranties**

#### *Submission*

106. The Commission supports the inclusion of provisions in the FTA that deal specifically with extended warranty agreements. In our view there is merit in regulating extended warranty agreements as part of the Commission's enforcement toolbox, given the relevance of extended warranty compliance issues to the Commission's Fair Trading work.
107. The Commission proposes that the summary of consumer rights under the Consumer Guarantees Act (CGA) should be prescribed.

#### *Proposed Amendment and Reasons*

##### Summary of consumer rights under the CGA

108. The Bill requires an extended warranty agreement to contain a summary of the consumer's rights under the CGA. The Commission agrees that all extended warranty agreements should include such a summary. However, we submit that the summary provided by the supplier should accord with prescribed content and form.
109. The Commission proposes this amendment for the following reasons:
- 109.1 We anticipate that this requirement has the potential to be the source of significant complaint to the Commission. The issue of whether or not a particular summary provided is an accurate summation of the consumer's rights is likely to be contentious.
- 109.2 A consumer's rights in any given situation will depend on the nature of the goods and services supplied and the nature of any issue / defect. Requiring a supplier to summarise such rights is onerous on suppliers. Furthermore, it gives unscrupulous suppliers the opportunity to understate the protection afforded by the CGA provisions.

#### *Current Situation*

110. Many New Zealand consumers are persuaded to purchase extended warranties, when in most cases these provide no greater protection than is afforded by the CGA. In many cases retailers sell an extended warranty, but omit to inform a consumer that

they already have consumer protection rights available to them under the CGA. This omission may breach the FTA.

111. The Commission has taken several court actions against car dealers for misrepresentations about the statutory rights of a purchaser. This can be a difficult area for enforcement as the representations are often verbal, subtle and/or involve silence as to the consumer's statutory rights. In addition, warranties are usually promoted and sold following the purchase of an expensive item, so it is difficult for investigators to obtain relevant evidence by adopting a consumer role.
112. The provisions in the Bill dealing with extended warranties address these issues.

### **Layby Sales**

#### *Submission*

113. The proposed layby sales provisions will provide for public enforcement in this area for the first time in New Zealand. As far as the Commission can judge at this time, the provisions appear to be reasonably clear and readily enforceable, although any additional guidance regarding the "reasonable costs" that can be charged by suppliers in the event of cancellation, would be helpful.

#### *Reasons*

114. Although the Commission currently has no formal enforcement role under the current Layby Sales Act, it can take action under section 13(i) of the FTA which prohibits misleading representations about consumers' rights. The recent prosecution of Chrisco for misleading customers about their cancellation rights under the Layby Sales Act is such a case. Despite its limited jurisdiction currently in this area, the Commission already receives a number of complaints and enquiries regarding Layby Sales.
115. At the discussion paper stage the Commission submitted that it was important to define as clearly as possible the costs that could be imposed by the supplier where the agreement is cancelled by the customer. In our view the proposed provisions are reasonably clear, although there may well be some dispute in individual cases. The effect of the word "*includes*" in Subsection 36F(4) is that the considerations set out there are not comprehensive. There may also be merit in stating what costs should not be taken into account.

### **Additional Product Safety Powers**

#### *Submission*

116. The Commission supports the provision of product safety inspection powers to authorised Commission employees. As currently drafted the relevant provisions also allow approved Ministry of Consumer Affairs staff to require the disclosure of the suppliers of suspect goods as well as any retailers sold to. Similar powers would also be useful for Commission staff in the product safety context.

*Reasons*

117. Currently Commission staff do not have inspection powers to check whether products may be in breach of the six mandatory product safety standards. These deal with toys for infants, flammability of children's nightwear, cots, baby walkers, bicycles and child resistance requirements for cigarette lighters. While in general traders allow Commission staff to inspect for suspect products on a voluntary basis, it is appropriate that Commission staff have a formal power to carry out this role.
118. It is also important that Commission staff have similar powers, as are proposed for Ministry of Consumer Affairs product safety staff, to require traders to disclose the suppliers of suspect goods as well as retailers sold to. Although the Commission could use its written notice powers to require such information to be provided, in practice that would take longer. It is vital that Commission staff can act quickly if suspect products are being sold to the public.

**Jurisdiction of Disputes Tribunals***Submission*

119. The Commission supports the extension of the jurisdiction of Disputes Tribunals to include section nine of the FTA which deals with misleading and deceptive conduct generally.

*Reason*

120. The Commission investigates a relatively small proportion of the thousands of FTA complaints that it receives each year. Consequently it is expected that consumers will deal with many of the issues themselves. The Disputes Tribunal is a key agency to assist the effective resolution of these matters. Allowing the tribunals to rule on any breaches of the FTA would seem to have obvious benefits.

**Contracting Out***Submission*

121. The Commission notes that the proposed contracting out provisions of the Bill may give clarity to those situations where suppliers may legitimately contract out of the FTA. The Commission submits that the provision allowing the Commission to bring proceedings for any offence, irrespective of whether the parties may have contracted out, is a useful safeguard against any abuse of this provision.

*Reason*

122. From time to time the Commission has taken action under the FTA where the relevant transactions have been part of a business to business relationship. The most common of these is the franchise situation.
123. It is likely that franchisors would, in future, seek to contract out of the FTA in reliance on the proposed provision. While the proposed limitations on the contracting out provisions may well be sufficient to prevent any abuse, the ability of the Commission to take action is an important additional safeguard.



## **Consumer Information Standards**

### *Submission*

124. The Commission supports the provision to allow Consumer Information Standards to specify how the information is obtained or verified before it is displayed.

### *Reason*

125. Currently, testing requirements may be prescribed for Product Safety Standards but not for Consumer Information Standards. This is relevant to the Water Efficiency Labelling Regulations, for example, where there is currently no legislative guidance as to the level of testing that is required. The issue of the level of testing that should be carried out to support such labelling is in essence a policy one. However, in the absence of any legislative guidance, the Commission, as the enforcement agency, is forced to make judgments as to the level of testing that suppliers should undertake. It is more appropriate that this be prescribed at the time when the regulations are being enacted.